

Insights: Alerts

Understanding the "Families First Coronavirus Response Act"

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic is dynamic and continues to develop. Please monitor this site and/or your email for updates.

As we previously addressed in various Alerts and Insights ([here](#), [here](#), and [here](#)), the continuing spread of the coronavirus (COVID-19) worldwide has created a great deal of disruption and uncertainty for employers and employees. Over the weekend, the U.S. House of Representatives passed important legislation regarding and responding to COVID-19's rapid spread across the United States. Specifically, the Families First Coronavirus Response Act (HR 6201) includes both public health measures and explicit paid leave and unemployment measures. If passed by the full Congress as written, no less than four different divisions of the Act would have significant impact on employers nationwide, including: Division C—Emergency Family and Medical Leave Expansion Act; Division D—Emergency Unemployment Insurance Stabilization and Access Act of 2020; Division E—Emergency Paid Sick Leave Act; and, Division G—Tax Credits for Paid Sick and Paid Family and Medical Leave.

There may be changes to the bill during Senate deliberations, and a vote on the proposed measures are expected in the next few days. Notably, President Trump [tweeted](#) on March 13, 2020, that he “fully support[s] H.R. 6201” and encouraged “all Republicans and Democrats to come together and VOTE YES!” (emphasis in original).

While changes to the bill during the ongoing deliberations are expected, it is also expected that Congress will pass, and the President will sign, some sort of emergency relief act in the near future. Accordingly, we outline the key provisions of HR 6201 that directly impact employers below, and will continue to monitor the legislation as it develops.

Emergency Family and Medical Leave Expansion Act

In order to address certain COVID-19 related situations, this section of the bill expands the employees and circumstances eligible for job-protected leave beyond that which would typically be protected under the FMLA. The proposed expansions include the following key provisions:

- **Employer Coverage.** The threshold for coverage has been lowered to 1 employee. Covered businesses/employers include those with *fewer than 500 employees*, while the Secretary of Labor has

authority to exempt small businesses with fewer than 50 employees if the law's requirements would "jeopardize the viability of the business as a growing concern." As of now, this section of the bill does not apply to employers with 500+ employees.

- **Individual Eligibility.** Eligible employees include both full and part-time employees, so long as the employee has been on the employer's payroll for 30 days. This varies considerably from the 12-month employment and 1,250 hours requirement usually applied to FMLA leave.
- **Covered Reasons for Leave.** Eligible reasons for FMLA leave under the Act include adhering to a required or recommended quarantine due to COVID-19; caring for a family member due to the family member's exposure to COVID-19; caring for a child (under age 18) of the individual related to the closing of a school or other care facility or care program. It is important to note that under the emergency provisions, the definition of family member and parent are both broadened. Generally the leave is not permitted to be intermittent, with the exception of leave taken to care for a child when schools or child care facilities close in response to COVID-19 concerns.
- **Paid v. Unpaid Leave.** The first 14 days of COVID-19 related leave may be unpaid (although an employee has the discretion to use available paid time off); however, after the first 14 days, the employer must pay the employee for the COVID-19 related FMLA leave at no less than 2/3 of the employee's regular rate of pay for the number of hours the employee would normally work. (Notably, this appears to conflict with the two weeks of paid sick leave related to an employee's quarantine, diagnosis, or care for COVID-19 provided for under the Emergency Paid Sick Leave Act, outlined in Division E and addressed below, which must be paid *at the employees regular rate of pay*.)
- **Determining Number of Hours Normally Worked.** Generally, the standard leave calculation is based on the number of hours the employee would "otherwise be normally scheduled to work." Where it would be unclear how many hours a part-time employee would have worked based on the employee's fluctuating schedule week-to-week, the Act includes a "varying schedule hours calculation" procedure, that relies upon either a 6-month average of hours or, if the employee has not been employed for a 6-month period, the reasonable expectations of the employee at the time of hire.
- **Return to Work.** Just as with traditional FMLA leave, eligible employees will have job protection and must be returned to the same or similar position when they return from emergency leave (although an exception exists to this provision in certain situations for employers with fewer than 25 employees).

As might be expected, the section includes anti-retaliation protections for employees who avail themselves of emergency FMLA for COVID-19 related reasons. Should the Act pass as written, it would take effect no later than 15 days after passing, and would it be in effect for a year.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act applies to private employers or individuals with 500 or fewer employees and public agencies or other entity that is not a private employer or individual employing 1 or more employees. There are a few areas that appear to conflict between this section and the FMLA amendments, which we address throughout.

This section provides both full-time and part-time employees with up to two weeks of paid sick leave at the employee's regular rate of pay for their own health issues related to COVID-19. However, if the employee's sick leave is taken to care for a family member (as opposed to the employee's own health issue), the required rate of

pay drops to 2/3 of the employee's regular rate of pay. Notably, this appears to conflict with the 2/3 of the employee's regular rate of pay structure included in the FMLA amendments. Additionally, it is unclear whether this leave is designed to run concurrently with, or in addition to, the expanded FMLA leave eligibility. While the FMLA coverage section allows for a 14 day period of unpaid leave, this appears to conflict with the structure of the two week Emergency Paid Sick Leave entitlement under this section of the Act.

For the Emergency Paid Sick Leave, full-time employees are entitled to take up to 80 hours of paid sick leave, while part-time employees are entitled to the number of hours the employee would usually work in a typical two-week period. Like the FMLA amendment section, this section of the Act also includes a "varying schedule hours calculation" procedure that relies upon either a 6-month average of hours or the reasonable expectations of the employee at the time of hire (if the employee has not yet worked 6 months).

Covered employees may take sick leave under this section for basically the same reasons enumerated in the FMLA expansion, including to self-quarantine due to a COVID-19 diagnosis; obtain a medical diagnosis or medical treatment for COVID-19; comply with the order of a public official or recommendation of a health care provider to avoid a physical presence at the job site due to COVID-19; care for the employee's family member who is quarantined or seeking treatment for COVID-19; and/or, provide care to a child who cannot provide self-care due to a COVID-19 related closure of a school or other care facility.

The paid sick time under this section would be available for immediate use by the employee, "regardless of how long the employee has been employed by the employer." This paid sick leave would be in addition to leave already offered by the employer's own voluntary policies, and an employer may not force an employee to substitute other paid leave provided by the employer before using the emergency paid sick leave. In addition, the Act prohibits employers from altering their voluntary policies to avoid the coverage of this provision. It appears that an employee's right to the emergency sick leave would not be renewable and would end once the employee returned from a previously taken emergency sick leave. This leave cannot be carried over to subsequent years. In fact, if adopted as written, the Act and the requirements under the Act expire on December 31, 2020.

Employers would have notice requirements, and would be prohibited from discharging, disciplining, or in any other manner discriminating against an employee who takes leave, has filed a complaint, or has instituted a proceeding, testified, or prepared to testify in a proceeding under or related to this Act. Employers violating this Act will be deemed to have failed to pay minimum wages under the Fair Labor Standards Act. Penalties available under the FLSA, including liquidated damages, would be available to employees for proven violations of the Emergency Paid Sick Leave Act.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

Among other things, this section of the Act anticipates that there may be a number of workers laid-off due to the impact of COVID-19. Not only does it provide 1 billion dollars in grant funding for additional measures that may be required in processing and paying unemployment benefits, but it also requires employers to provide notification of eligibility to those workers; requires the state make accessible at least two of three ways (in-person, by phone, or online) for laid-off workers to apply for benefits; and, establishes a method by which applicants will receive notice at various points throughout the process, including when an application is received, processing, and/or cannot be processed. States are also expected to loosen the eligibility

requirements for unemployment applications related to COVID-19 and take any steps necessary to ensure adequate resources in periods of high demand.

Tax Credits

Notably, the bill also provides tax credits for employers covering “an amount equal to 100 percent of the qualified sick leave wages paid” to offset the costs of paying the emergency sick leave and/or paid FMLA leave required under the Act. The credits also apply to self-employed individuals.

Effect on Existing Employment Benefits

Nothing in the Act is intended to diminish an employer's obligation to comply with any contract, collective bargaining agreement, or any employment benefit program or plan that provides greater paid sick leave or other leave rights to employees. Similarly, H.R. 6201 was not drafted to discourage employers from adopting or retaining leave policies that are more generous than those in the Act. However, the Act expressly requires employers to increase their coverage to provide employees the rights established in the Act, even where an existing contract, collective bargaining agreement, or any employment benefit program or plan may offer less protection.

Previous Presidential Proclamation

On Friday, March 13, the President issued a [proclamation](#) declaring a national state of emergency, and [directed various agencies to take specific actions in response](#). These directives contained various economic relief measures, but did not create explicit requirements for employers.

Conclusion

While this bill is in no way final law, and leaves many questions unanswered, it is still valuable for employers to understand the potential actions Congress may take in responding to COVID-19. Hopefully we will shortly receive more information about some of the more ambiguous provisions, including the tangible impact of the emergency FMLA provisions on employers with fewer than 50 employees who are usually exempt from the FMLA; the interplay of these federal provisions with the various already existing local and state paid sick leave laws; and/or the regulations that will govern the Department of Labor throughout the implementation and oversight of the eventual emergency act.

Should you need assistance responding to a specific COVID-19 issue, or preparing your workforce for an emergency, please contact any of the following Kilpatrick Townsend Labor & Employment attorneys:

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